

IN THE MATTER OF LICENSE NO. 200574
Issued to: LIVINGSTON R. WHITE Z 91580-R

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1501

LIVINGSTON R. WHITE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 21 July 1964, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for two months outright plus four months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as master on board the United States SS SIERRA under authority of the license above described, on or about 26 August 1963, Appellant negligently failed to keep out of the way in a crossing situation in which his vessel was burdened, thus contributing to a collision with SS MASSMAR. Three other specifications were dismissed after being found proved.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

By stipulation between the Investigating Officer and counsel, there was introduced into the record the transcript of witnesses taken in an earlier proceeding under 46 CFR 136. A further stipulation was made that it was neither customary practice or good seamanship for vessels departing Long Beach (California) Harbor northbound to steer a course for Los Angeles Harbor entrance buoy.

In defense, Appellant offered in evidence additional testimony by himself and that of another witness. He also introduced into evidence a chart of the Los Angeles - Long Beach area on which he had reconstructed the movements of SIERRA, MASSMAR, and the vessel, TELDE, approaching from the south.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of two months outright plus four months on twelve months' probation.

The entire decision was served on 21 July 1964. Appeal was timely filed on 7 August 1964. Materials in support of the appeal were filed on 4 November 1964.

FINDINGS OF FACT

On 26 August 1963, Appellant was serving as master of the United States SS SIERRA and acting under authority of his license while the ship was at sea.

SIERRA is a steam vessel of 7920 tons, 492 feet in length. At the material time it was bound from San Francisco to Los Angeles Harbor.

Just prior to 0500 (Zone + 7 Time), SIERRA had been on course 090°, passing Point Fermin somewhat over a mile off. At 0500 course was changed to 120° to avoid a fishing vessel and speed was reduced to half. At 0504 course was again changed to 027° to head for Los Angeles Harbor Entrance Buoy ("LA") about one mile away. At 0506 speed was reduced to slow; at 0508 the engine was stopped and heading was changed to 355°.

The pilot boat came alongside to starboard and the pilot boarded. When Appellant saw that the pilot was aboard, at 0515, with buoy "LA" close aboard to port, he rang up full ahead. The pilot reached the bridge, was advised that the engine was on full ahead, and went to the starboard wing. He saw MASSMAR closing on the starboard side and ordered full astern, which was rung up at 0516. At 0517 or 0517.5 the stem of the MASSMAR struck the starboard side of SIERRA.

MASSMAR, a liberty ship, had dropped the port pilot in close proximity to Buoy "LB", after departure from Long Beach, and at 0500 set speed at full ahead, on course 257°. At 0510 SIERRA's green light was sighted to port. Course was altered to 253°. At 0515, with SIERRA close to port, the bow lookout of MASSMAR rang three bells. At about 0516 the lookout again rang three bells and the master rang up full astern and ordered hard right rudder. Shortly after 0517, at the time of collision, MASSMAR'S heading had changed to 267°.

There was extensive damage to both vessels but there were no personnel casualties.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the rules for vessels crossing do not apply to this case, but rather that the special circumstance rule governs.

Other arguments are made in the brief to the effect that Appellant's failure to know that MASSMAR was in the vicinity and his going full ahead after taking aboard the pilot were not negligent.

It is also argued that the order is excessive in view of Appellant's prior clear record and because of the disparity of treatment accorded Appellant and the master of the other vessel.

Other matter submitted, outside of the record, cannot be given weight here.

APPEARANCE: Graham James & Rolph, Los Angeles, Cal., by Leo J. Don A. Proudfoot, Jr., Esquires.

Vander Lans and

OPINION

I

the testimony of the master of MASSMAR with respect to the movements and relative positions of the vessels is inconsistent with the records of SIERRA, and even lacks self-consistency. These inconsistencies were not resolved on the record.

The master stated that when his vessel was headed for Buoy "LA" on course 257°t, he was about 1.3 or 1.4 miles from the buoy. At the same time, 0510, he saw SIERRA about twenty-two degrees on his port bow, distant about nine-tenths of a mile, apparently dead in the water at a point eight or nine-tenths of a mile due south of the buoy. Inexplicably, he did not again see SIERRA until his lookout called his attention to it by giving the bell signal for a vessel dead shortly before the collision.

His estimates of distances and directions on first sighting SIERRA at 0510 would place him not 1.3 or 1.4 miles from Buoy "LA", but only nine-tenths of a mile away with the buoy bearing about 285/d/t.

Also, it is noted that SIERRA'S engine was stopped two minutes before the sighting by the master of MASSMAR and remained stopped for seven minutes. This is inconsistent with the observation that SIERRA was dead in the water at 0150, yet closed undetected to the collision point seven minutes later.

A further inconsistency lies in MASSMAR's placing the collision to the south of the buoy, with the buoy in sight even up to the moment of impact, while SIERRA claims to have had the buoy on her port beam. MASSMAR's master testified that at the time of collision he could see the buoy on his starboard bow less than a shiplength away. This does not appear possible considering that the angle of impact was about ninety degrees and SIERRA was struck at number three hold.

Appellant placed in evidence a chart upon which he reconstructed his version of the vessels' positions and movements prior to the casualty. Since I cannot reconcile the testimony of the master of MASSMAR as to bearings and distances with certain uncontested facts, I have accepted as factual, on this appeal, Appellant's version.

In this case there were originally four specifications of negligence. The first was on the one ultimately found proved. The second alleged affirmatively that Appellant had negligently crossed ahead of a privileged vessel. The third stated that Appellant had negligently ordered full ahead after failing to ascertain the presence of an approaching vessel, thereby contributing to the collision. The fourth asserted a negligent failure to utilize radar to determine the presence of the approaching vessel.

Of the four specifications of the Examiner concluded:

"The first specification, as amended, is hereby found proved. The second, third and fourth specifications, having been amended and incorporated in the first specification, are, although the facts have been found proved, hereby dismissed."

There is nothing in the record to indicate that the last three specifications had been "incorporated" in the first specification. The matter is mentioned for the first time at page 3 of the Decision in the words quoted above, and is referred to again at page 6:

". . .it is the opinion of the Examiner that the four specifications consist basically of one specification of negligence and merely recite the particulars upon which the negligence charge is based. For this reason, the four specifications were amended into one specification."

Dismissal was a proper order on the merits with respect to the specification alleging negligence in the failure to utilize radar. There is at present no requirement that radar be used during good visibility. (See Appeal Decision No. 1469, p.5). It may be cause for wonder that Appellant, looking at his radar, was unaware of the presence of MASSMAR, but it is not negligent of him to fail to utilize a device when he had no duty to use it under conditions obtaining.

As to the "incorporation" of the other specifications into the first, it may be noted that the theory of "merger" may at times be validly utilized. Certainly it is proper to dismiss a specification when it is included in all respects within the bounds of a greater allegation found proved, as "wrongful failure to join" is included within a proved "desertion."

There is no such "lesser included offense" in the instant case. The specification dealing with crossing ahead merely spells out the precise manner in which the starboard hand rule was violated in this collision, but finding that the rule was violated does not necessarily imply that the burdened vessel crossed ahead. If all the allegations are found to be factual, as the Examiner found here, it is appropriate to consider the more specific allegation as duplicitous for purposes of making an order.

Similar consideration could be given to the allegation found proved that Appellant had negligently ordered full ahead without having ascertained the presence of a nearby vessel, this being treated as merely one phase of an overall course of negligent conduct. But here I do not think dismissal of the specification was appropriate. The actions alleged in that specification could be found to constitute negligence whether the starboard hand rule applied or not. The dismissal of this specification leaves only one issue to be decided on appeal. Either the starboard hand rule applies or the charge must be dismissed, however negligent Appellant's conduct may have been.

III

To proceed immediately to the sole issue of the law here involved, I note that Appellant gives

four reasons why the rule of special circumstance and not the starboard hand rule should be applied here.

First is that other vessels were in the vicinity, the pilot boat and TELDE. On the evidence given, the pilot boat in no way embarrassed any other vessel and no maneuvers were undertaken with respect to it. TELDE, from the information supplied by Appellant, was approaching the pilot station from the south at a speed of a little over five knots on a northerly heading. At the time of the collision TELDE was still almost a mile on the starboard quarter of SIERRA and had given no signal of intent to overtake. Appellant cannot therefore argue that his duty to TELDE (to maintain course and speed as an overtaken vessel) conflicted with his duty to MASSMAR to stand clear. He had as yet no duty to maintain course and speed.

It is urged that the changes of speed of MASSMAR and the course of four degrees at 0510 resulted in her "not maintaining a definite and predictable course and speed" such as the starboard hand rule requires.

After dropping the pilot on a slow ahead bell, MASSMAR at 0500, seventeen minutes before collision, began accelerating to full ahead. At 0510, seven minutes before collision, course was changed four degrees to the left.

In United States v. SS SOYA ATLANTIC, D. C. Md. 1963, 213 F. Supp. 7, the privileged vessel in a crossing, after dropping a pilot, began to accelerate to full speed twelve minutes before collision, and seven minutes before collision altered course nine degrees to the right. It was held that the vessel had maintained course and speed within the starboard hand rule. The same must be said here of MASSMAR.

A third reason is advanced to take this case out of the starboard rule and that is that SIERRA was drifting.

There is disagreement among the courts as to the application of the starboard hand rule when a drifting vessel has an approaching vessel on its starboard bow.

In the Wesley A. Gove, D. C. Mass. 1886, 27 Fed. 311. Another case, The America, D.C. E.D. N.Y., 1886, 29 Fed. 304, gives the appearance of holding the same. Its second headnote in the syllabus reads "Rule 19 does not apply where the vessel having the other on her starboard hand is at rest." This is most misleading. Reading of the very brief text of the decision shows that the moving vessel was in turn on the starboard quarter of the drifting vessel. Thus there was a situation where the drifting vessel, if suddenly moved ahead, would move away from the other. It was clearly outside the crossing rules.

In The Umbria, C.A. 2 1907, 153 Fed. 851, a drifting tow had an approaching vessel on its starboard bow. The starboard hand rule was rigorously applied. See also The City of Camden, C.A. 3 1930, 44 F.2d 711, to the same effect. I am not persuaded by the reasoning of the District Court

in The Wesley A. Gove, supra, and I feel constrained to follow the two later Courts of Appeals holdings.

Of course, in the instant case, it is not demonstrated that SIERRA was absolutely at rest at any time. "Soaking" is the term used by some witnesses to describe SIERRA'S dead slow movement, as if approaching a berth. In point here is Northern Transportation Co.v. Davis, C.A. 2 1922,282 Fed. 209, in which a vessel "killing time" while awaiting boarding officials was held bound under the starboard hand rule to keep out of the way of a tow on her starboard bow.

Appellant also urges as reason to invoke the rule of special circumstance the fact that SIERRA was engaged in picking up a pilot and refers me to page 517 of Griffin on Collision. All the cases cited by Griffin deal with the maneuvers of the approaching vessel with respect to the pilot boat itself and are not pertinent here. Northern Transportation Co. v. Davis, supra, fits the situation better.

I hold that the starboard hand rule applies to the instant case.

IV

While the sole issue has been disposed of. and Appellant's arguments as to the Examiner's opinion of his specific acts prior to the collision need not be met in determining whether the finding should be affirmed, they will be considered because these acts have a bearing upon the propriety of the order.

The assertion is made by Appellant that his lack of knowledge of the presence of the other ship cannot be held negligent in the absence of a showing that he had " negligently failed to properly instruct the members of the crew on lookout and radar procedure or negligently failed to ascertain the position of the MASSMAR when under some personal obligation to do so."

The presumption of competence of the crew, with reliance by Appellant upon it, is of no comfort to him here. It is established in the record, and it is conceded in the brief on appeal, that he was personally supervising the maneuvering of the vessel. If his vessel violated the steering and sailing rules while he was in control he was certainly responsible whatever the failure of others in his crew. It is argued in the brief that Appellant's attention was "properly concentrated" on maneuvering to pick up the pilot, "all the while being aware of the overtaking TELDE." I see no cogency in the argument that attending to one's own maneuvers and the maneuvers of a vessel to which Appellant's vessel had no obligation excuses a failure to attend to a vessel to which an obligation is owed.

To the same effect it is urged that Appellant's failure to ascertain the presence of MASSMAR was not neglect because it was "contrary to both custom and good seamanship for any vessel to be approaching on the course taken by the MASSMAR." A stipulation placed before the Examiner is the basis for this question, and there is some testimony in the record that vessels leaving Long Beach for ports to the north usually proceed a mile or two beyond the Buoy "LB" before turning to the first, western, leg of the voyage.

I can find in the Pacific Coast Pilot not even a recommendation for the courses of vessels bound north from Long Beach. Once a vessel has cleared the breakwater it is in the open sea and has the privilege of navigating in any direction at the master's discretion, subject only to the requirements of the International Rules of the Road. The fact that few vessels might be expected to follow the route that MASSMAR took does not render the crossing rules inoperative nor relieve a burdened vessel of its responsibility. And, of course, the argument given here does not take into account the fact that many vessels, not bound for ports to the north, might come out of Long Beach and for their own purposes follow the route that MASSMAR took

V

Appellant has no prior record, and argues that the disparity of treatment accorded himself and the master of MASSMAR calls for a reduction of the order. I take official notice that in a final decision dated 22 July 1964, an Examiner dismissed charges of negligence, stemming from this collision, against MASSMAR's master. From the record of the instant case, I might suspect that properly framed charges of negligence might have been sustained against the other master, But I do not know, however, that the disposition of his case bears upon Appellant's.

Appellant contributed to a collision with a privileged vessel in good visibility as a result of his complete failure to become aware of the presence of the other ship, which had been there to be seen for at least ten minutes, until collision was unavoidable. It is true that Appellant's lookout failed in his duty to observe and report the approaching vessel, But this does not excuse Appellant from duty to apprise himself of the presence of visible vessels, especially those toward which the law imposes upon him a duty.

I do not consider the order excessive.

VI

There is one point in connection with the order which I note although it is not raised on appeal. Suspension is imposed upon both Appellant's license and his Merchant Mariner's Document. I consider that this is a case within the exceptions set out in 46 CFR 137.20-170(c). Because the negligence involved was peculiarly that of a licensed officer of a merchant vessel, no action is appropriate against the Merchant Mariner's Document. Appeal Decision 1472.

CONCLUSION

I conclude that the charge and specification were proved by reliable, probative and substantial evidence, and that the order, while appropriate, should go only to Appellant's license.

ORDER

The ultimate findings of the Examiner, dated at Long Beach, California, on 21 July 1964, are AFFIRMED. The order is MODIFIED so as to apply only to Appellant's license. and MODIFIED is AFFIRMED.

W. D. Shields
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 20th day of May 1965.

INDEX

CHARGES AND SPECIFICATIONS

- merger of specifications

COLLISION

- crossing situation

CROSSING SITUATION

- burdened vessel, duties of
- drifting vessel
- duty to keep clear
- failure to see other vessel
- pilot, picking up
- special circumstances, not applicable

INVESTIGATIONS

- record of, stipulated in evidence

LESSER INCLUDED OFFENSE

- example, not applicable

MODIFICATION OF EXAMINER'S ORDER

- document not affected by order

NAVIGATION, RULES OF

- crossing situation

NEGLIGENCE

- failure to keep out of way
- failure to see other vessel
- document not affected by order

RADAR

- collision in clear weather

SPECIAL CIRCUMSTANCES

- held not applicable